

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JOSE LUIS HERNANDEZ-RAMIREZ,

Case No. 2:15-cv-01280-MMD-VCF

Petitioner,

ORDER

v.

ATTORNEY GENERAL OF THE STATE
OF NEVADA,

Respondent.

Jose Luis Hernandez-Ramirez, who is incarcerated in the Henderson, Nevada, Detention Center, has submitted a petition for a writ of habeas corpus, initiating this habeas corpus action.

Hernandez-Ramirez did not initially pay the filing fee of \$5.00, and he did not submit an application to proceed *in forma pauperis*. On July 13, 2015, the Court ordered him to either pay the filing fee or apply to proceed *in forma pauperis*. (Dkt. no. 2.) On July 23, 2015, Hernandez-Ramirez filed an application to proceed *in forma pauperis*. (Dkt. no. 3.) The information provided by Hernandez-Ramirez in that application indicates that he is unable to pay the filing fee. The Court will, therefore, grant Hernandez-Ramirez's application to proceed *in forma pauperis* and will not require him to pay the filing fee.

The Court has reviewed Hernandez-Ramirez's petition for a writ of habeas corpus pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, and it appears that the petition does not state a potentially

1 meritorious claim for habeas corpus relief and is subject to dismissal. The Court will
2 grant Hernandez-Ramirez an opportunity to show cause why this action should not be
3 dismissed for the reasons described below.

4 Hernandez-Ramirez states in his petition that in 2009 he was convicted of the
5 crime of attempted theft, a gross misdemeanor, in Nevada's Eighth Judicial District
6 Court, and sentenced to a period of probation. See Petition for Writ of Habeas Corpus
7 (dkt. no. 1 at 1). Hernandez-Ramirez does not make any claim that he pursued a direct
8 appeal to the Nevada Supreme Court. He goes on to state that on December 16, 2014,
9 he was arrested by the Department of Homeland Security, and that removal
10 proceedings were initiated against him. See *id.* He states that, currently, his appeal to
11 the Board of Immigration Appeals (BIA) is pending. (See *id.* at 1-2.)

12 It is unclear whether, in this action, Hernandez-Ramirez challenges his state-
13 court conviction or the federal removal proceeding. With respect to the relief he seeks,
14 his petition states only that his petition should be granted. The petition purports to be
15 brought under 28 U.S.C. § 2241, but it names as respondent the Attorney General of
16 the State of Nevada, and has attached a copy of an order entered in the state district
17 court in a state habeas proceeding. However, whether construed as a petition under 28
18 U.S.C. § 2241 challenging the removal proceeding, or a petition under 28 U.S.C. § 2254
19 challenging his state-court conviction, the petition appears to be without merit.

20 28 U.S.C. § 2241 provides for habeas corpus relief for persons, “in custody under
21 or by color of the authority of the United States.” 28 U.S.C. § 2241(c)(1). However, with
22 limited exceptions that appear inapplicable here, habeas corpus relief from final orders
23 of removal lies only with the court of appeals. 8 U.S.C. §§ 1252(a)(5), 1252(e);
24 *Mamigonian v. Biggs*, 710 F.3d 936, 941 (9th Cir.2013). It appears, therefore, that this
25 Court lacks jurisdiction over Hernandez-Ramirez's petition.

26 Moreover, with respect to removal proceedings, judicial review is permitted only
27 regarding final orders. 8 U.S.C. § 1252(b)(9) (“Judicial review of all questions of law and
28 fact, including interpretation and application of constitutional and statutory provisions,

1 arising from any action taken or proceeding brought to remove an alien from the United
 2 States under this chapter shall be available only in judicial review of a final order under
 3 this section.”). An order of removal becomes final when affirmed by the BIA. See 8
 4 U.S.C. § 1101(a)(47)(B). According to Hernandez-Ramirez's petition, his appeal to the
 5 BIA is pending, so there is not yet a final order.¹ Therefore, judicial review is not
 6 permitted. See *Galindo-Romero v. Holder*, 640 F.3d 873, 877 (9th Cir.2011).

7 Moreover, Hernandez-Ramirez's petition does not state any ground for relief with
 8 respect to the federal removal proceeding.

9 Therefore, construed as a petition for writ of habeas corpus pursuant to 28
 10 U.S.C. § 2241 challenging the removal proceedings, the Court lacks subject matter
 11 jurisdiction. Setting aside this jurisdictional defect, Hernandez-Ramirez's habeas petition
 12 appears to be without merit and subject to dismissal.

13 28 U.S.C. § 2254 provides for habeas corpus relief for a prisoner in custody
 14 “pursuant to a judgment of a State court.” See 28 U.S.C § 2254(a). However, a federal
 15 court may not grant habeas corpus relief on a claim for relief under section 2254 not
 16 exhausted in state court. 28 U.S.C. § 2254(b). To exhaust a claim, a petitioner must
 17 fairly present the claim to the highest state court, and must give that court the
 18 opportunity to address and resolve it. See *Duncan v. Henry*, 513 U.S. 364, 365 (1995)
 19 (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). A wholly unexhausted
 20 petition is subject to dismissal. See *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir.2001)
 21 (“[T]he district court was ‘obliged to dismiss immediately,’ as the petition contained no
 22 exhausted claims.”) (citing *Greenawalt v. Stewart*, 105 F.3d 1268, 1274 (9th Cir.1997)).

23 ///

24 ///

25 ¹The pendency of Hernandez-Ramirez's appeal to the BIA can also be viewed as
 26 a failure to exhaust. “An applicant’s failure to properly raise an issue to the [BIA]
 27 generally constitutes a failure to exhaust, thus depriving [the court] of jurisdiction to
 28 consider the issue.” *Cervantes v. Holder*, 772 F.3d 583, 590 (9th Cir.2014). As
 Hernandez-Ramirez's case is still pending before the BIA, he has not exhausted any
 claim regarding his removal proceeding.

1 It appears that Hernandez-Ramirez has not exhausted any claim in state court.
2 He states in his petition that he filed a petition for writ of habeas corpus in the state
3 district court in April 2015. See Petition for Writ of Habeas Corpus (dkt. no. 1 at 1).
4 Also, he has attached to his petition a copy of an order entered in the state district court
5 in April 2015, requiring a response by the State to his petition in that court. See Order
6 for Petition for Writ of Habeas Corpus, attached to Petition for Writ of Habeas Corpus.
7 He goes on to state that "[t]he Clark County District Court dismiss[ed] his motion on
8 June 10, 2015," because he is out of custody. See Petition for Writ of Habeas Corpus at
9 1. Hernandez-Ramirez does not state that he appealed to the Nevada Supreme Court
10 from the dismissal of his state habeas petition.

11 As it appears that Hernandez-Ramirez has yet to present any claim for relief to
12 the Nevada Supreme Court, his petition in this case, construed as a challenge to his
13 state-court conviction, appears to be wholly unexhausted and subject to dismissal.

14 Moreover, Hernandez-Ramirez's petition does state any federal ground for relief
15 with respect to his state-court conviction, and is subject to dismissal for that reason as
16 well.

17 It is therefore ordered that petitioner's application for leave to proceed *in forma*
18 *pauperis* (dkt. no. 3) is granted. Petitioner is granted leave of Court to proceed *in forma*
19 *pauperis*. Petitioner need not pay the filing fee for this action.

20 It is further ordered that petitioner shall have forty-five (45) days from the date of
21 entry of this order to show cause why the Court should not dismiss this action for the
22 reasons explained above. If petitioner does not respond to this order within the time
23 allowed, or if he does not make the required showing, this action will be dismissed.

24 It is further ordered that the Clerk of the Court shall add Adam Paul Laxalt,
25 Attorney General of the State of Nevada, as counsel for respondents.

26 It is further ordered that the Clerk of the Court shall electronically serve upon
27 respondents a copy of the habeas corpus petition in this case (dkt. no. 1), and a copy of
28 this order. Respondents' counsel shall enter a notice of appearance within thirty (30)

1 days of the entry of this order, but need take no further action in this case unless and
2 until the Court so orders.

3
4 DATED THIS 27th day of July 2015.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE